

THE GEORGE HYMAN
CONSTRUCTION COMPANY

CONTRACT NO. V101BC-0036

VABCA-3774

VA MEDICAL CENTER
PALM BEACH, FLORIDA

Alexander J. Williams, Jr., Esq., Leiby, Ferencik, Libanoff, and Brandt, P.A., Fort Lauderdale, Florida, for the Appellant.

Paul Embroski, Esq., Trial Attorney; *Phillipa L. Anderson, Esq.*, Deputy Assistant General Counsel; and *William E. Thomas, Jr., Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE ANDERS

In January, 1991, the Department of Veterans Affairs (VA or Government) awarded a contract in the amount of \$105,978,000 to The George Hyman Construction Company (Hyman or Appellant) for the construction of a 400-bed medical center and parking garage in Palm Beach, Florida.

Hyman submitted a request to the Contracting Officer on May 28, 1992 for a final decision on a claim in the amount of \$97,646 for the cost of providing cellular glass insulation (sometimes referred to as "foam glass") for chilled water pipes. Appellant contends that the contract permitted the use of mineral fiber insulation (sometimes referred to as "Fiberglass"). On September 9, 1992, the Contracting Officer issued a final decision denying the claim. This appeal is from that decision.

The VA has filed a Motion for Summary Judgment, asserting that there is no genuine issue of material fact, and that the Government is entitled to judgment as a matter of law. Appellant agrees that there are no material facts in dispute, and describes the sole issue before the Board as one of contract interpretation concerning the type of insulation required by the terms of the contract to be installed on the above-ground "chilled" water piping in the new VA Medical Center, Palm Beach, Florida.

The appeal file consists of the Complaint; Answer; Rule 4 File, the Government's motion; Appellant's brief in opposition; and the Government's reply brief. Exhibits attached to the Government's motion are identified herein as "Mot. Exh." Exhibits attached to Appellant's brief in opposition are identified as "App. Exh."

**FINDINGS OF FACT FOR THE PURPOSE OF RULING
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT**

Sparta Insulation Company (Sparta), the real party in interest, is a second tier subcontractor on the referenced project and was engaged by Poole and Kent, a subcontractor, to perform some of the work required under Poole and Kent's HVAC and Mechanical subcontract with Hyman. Sparta manufactured and installed the insulation material. The Sparta contract price was \$1,650,000.

This appeal involves the price difference between applying cellular glass insulation as opposed to mineral fiber insulation on the chilled water piping for this project.

The parties agree that the amount of the claim is not in dispute, and that, if the contract clause in dispute is ambiguous, it is a patent ambiguity.

The disputed clause is found in Section 15250 of the insulation specifications. It reads as follows:

2.4 CELLULAR GLASS INSULATION

A. ASTM C552, density 8.5 pcf nominal, k = 0.38:

Pipe and tubing, covering, standard thicknesses as tabulated for chilled water piping.

Nominal Pipe Size, Inches:	Thru 1-1/2 inch	2 to 6	8 to 12	Over 14
1. 40-60F (CH, CHR, within Chiller Room, Horizontal Pipe Chase and Underground)	2.0	3.0	3.0	4.0
2. 40-60F (CH, CHR, Outside Chiller Room)	1.5	2.0	2.0	2.5
3. With standard thickness increased to provide equal thermal efficiency, <i>cellular glass may be used in lieu of Form D mineral fiber insulation for above ground piping.</i> [Emphasis added]				
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*	*			

(R4, tab 3)

Specification §15259-1.1(B)(3) defines "Cold" as "[p]iping handling media at design temperature of 60 degrees or below." (R4, tab 3)

Specification §15250-1.1(B)(7) defines "Hot" as "[p]iping handling media above 105 degrees." (R4, tab 3)

Specification §15250, Part 2, PRODUCTS, identifies the various types of insulation materials and products required to be used on the project. (R4, tab 3)

Specification §15250-2.2, MINERAL FIBER INSULATION, indicates that mineral fiber insulation is required for "hot" application on ductwork, piping and equipment. (R4, tab 3)

Specification §15250-2.2(E) requires that "Form D, Type III (Molded)" mineral fiber insulation be used "for temperatures up to four hundred fifty degrees F, in nominal thickness as tabulated for piping above ground," and the chart at Specification §15250-2.2(E)(1)-(4) tabulates the standard thicknesses required for application of mineral fiber insulation on "hot" water piping and tubing (100 degrees F to 350 degrees F), depending on pipe sizes and temperature. (R4, tab 3)

Specification §15250-2.4, CELLULAR GLASS INSULATION, requires the installation of cellular glass insulation on "cold or chilled" water piping, tubing and equipment. (R4, tab 3)

Specification §15250-2.4(A) tabulates the standard thicknesses required for application of cellular glass insulation on "chilled" water piping and tubing (40 degrees F to 60 degrees F), depending on pipe sizes and temperature. (R4, tab 3)

Paragraph 1 of Specification §00100, EXPLANATION TO PROSPECTIVE BIDDERS (FAR 52.214-6)(APR 1984), provides that:

Any prospective bidder desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing soon enough to allow a reply to reach all prospective bidders before the submission of their bids. Oral explanations or instructions given before the award of a contract will not be binding. Any information given to a prospective bidder concerning a solicitation will be furnished promptly to all other prospective bidders as an amendment to the solicitation, if that information is necessary in submitting bids or if the lack of it would be prejudicial to other prospective bidders.

Larkin Hobbs, VA Project Manager, stated in his deposition that neither Hyman nor any of the other prospective bidders requested information or clarification of Specification §15250-2.4 before bid opening. (Mot. Exh. 6, at 1) Sparta's estimator, Albert McDonald, stated in his deposition that when he was preparing prices for Sparta's bid one area "was a little gray," referring to Section 15250-2.4(A)(3) and the question of where mineral fiber was permitted; and that he called Mario Gutierrez, with the VA's architect/engineer (A/E) firm and requested clarification, but was told to bid it as he saw it. (Mot. Exh. 7, at 6)

Mr. McDonald discussed this problem with James Collier, part owner of Sparta, about two weeks before time for submitting the bid. Mr. Collier stated in his deposition that after Mr. McDonald received no clarification from Mr. Gutierrez, "From past history we kicked it around and priced it both ways and decided that to get the job we had to go with the Fiberglass [mineral fiber] price" because it was cheaper. Mr. Collier stated that no written request for clarification of what the specifications required for chilled water piping was submitted to anyone. (Mot. Exh. 1, at 6-8)

Mr. Mario Gutierrez stated in his deposition that he did not know Mr. McDonald and had received no telephone calls from him. (App. Exh. B, at 29)

On or about June 12, 1991, Hyman submitted Submittal No. 15250-2, "INSULATION - PLUMBING - HVAC" to the A/E for review and recommendation for approval to the VA Resident Engineer. The Submittal identifies "Sparta Ltr. Dated 4/29/91 (1) Plumbing (2) HVAC" as deviations from the specification requirements. (R4, tab 4)

At page 2 of Sparta's April 29, 1991 letter to Poole and Kent, Sparta states that Specification §15250-2.4(A)(3) provides that "[w]ith standard thickness increased to provide equal thermal efficiency, cellular glass may be used in lieu of Form D mineral fiber insulation for above ground piping," and further states that "[t]he table shown has the thicknesses for cellular glass," and "[w]e propose to use mineral fiber for above ground piping, with the thickness provided to give the same R factor as cellular glass." (R4, tab 4)

On July 30, 1991, based on the recommendations of the A/E, the VA Resident Engineer (RE) rejected Submittal No. 15250-2. Paragraph 7 of the RE's handwritten list of "Deviations" states that "[t]he use of mineral fiber insulation on CH and CHR piping is not acceptable as [Specification] 15250 para 2.4.A requires cellular glass. Paragraph 2.4.A.3 allows the use of cellular glass where mineral fiber is required as in paragraph 2.2E." (R4, tabs 5-6)

After Hyman provided additional information to the RE and requested reconsideration, the RE referred the matter to the Contracting Officer for consideration. On January 14, 1992, the RE notified Hyman that the Contracting Officer had determined that the contract required cellular glass insulation on chilled water piping and chilled water return piping. (R4, tabs 7-11, 15)

On May 28, 1992, Hyman requested a final decision from the Contracting Officer. (R4, tab 15) On September 9, 1992, the Contracting Officer issued a final decision denying Hyman's claim on the basis that, among other things, Specification §15250-2.4 (A)(3) does not permit mineral fiber insulation to be used in lieu of cellular glass insulation for above-ground chilled-water piping. (R4, tab 22) This appeal is from that decision.

In its opposition to the motion for summary judgment, Hyman references a prior VA contract in Miami, Florida, where Sparta was the insulation contractor. A dispute arose under that contract when the VA directed that cellular glass insulation be installed on the hot, solar water piping, pursuant to Section 15250-2.4(A)(3)(a). Sparta had argued that Section 15250-2.2(D) permitted it to install mineral fiber insulation on the hot, solar water piping. Section 15250-2.4, CELLULAR GLASS INSULATION, provided, at (A)(3)(a), for cellular glass insulation "3 inches thick for hot water piping connecting to solar heated water tanks." This conflicted with Section 15250-2.2, MINERAL FIBER INSULATION, which permitted, at (D)(1-6), installation of mineral fiber insulation on *both* hot and chilled water piping (0 degrees F to 450 degrees F). (Mot. Exh. 1, pages 15250-6 and 15250-8) The Miami specifications also included, in Section 15250, 2.4 CELLULAR GLASS INSULATION, at A.1: "With thickness increased to provide equal thermal efficiency, cellular glass may be used in lieu of Form D mineral fiber insulation for above ground piping."

The contractor's claim in the Miami dispute was for \$26,447.90. The dispute was

settled, and the contractor was paid \$24,543.20. (Encl. with Notice of Appeal)

Sparta's estimator, Mr. McDonald, was not aware of the Miami dispute or its outcome when he made the insulation estimates for the Palm Beach project. (Mot. Exh. 7, at 26)

Hyman submitted the deposition of Todd Carey, who Hyman proposed as an expert, and whose expertise was not questioned by the VA. Mr. Carey stated that it was his professional opinion that the insulation specifications for this project did not preclude the use of mineral fiber insulation for above ground chilled water piping. (App. Exh. D, at 12,13,17,19) Carey further opined that Section 15250-2.4(A)(3) gave the contractor an option to choose the insulating material most cost effective for the project and that "in lieu of" meant the products could be substituted for one another. (App. Exh. D, at 12, 23)

DISCUSSION

Hyman asserts that the contract is ambiguous and that its interpretation is reasonable and should prevail over that of the Government. However, a contract is ambiguous only when it is susceptible to two or more different and reasonable interpretations, each one of which is consistent with the contract language. *Pacific Architects and Engineers*, ASBCA No. 45,136, 94-2 BCA ¶ 26,604, citing *Sun Shipbuilding and Dry Dock Co. v. United States*, 393 F.2d 807. A mere dispute over the terms does not constitute ambiguity, and an interpretation which is merely possible is not necessarily reasonable. *Tri-Cor, Inc. v. United States*, 198 Ct. Cl. 187, 211, 458 F.2d 112, 126 (1972).

There is only one reasonable interpretation of the contract requirement for the type of insulation to be installed on chilled-water piping. The Government succinctly explains this as follows, and we agree:

The contract insulation specifications are clear and unambiguous. Specification §15250-2.2(E) clearly *requires* the contractor to install mineral fiber insulation on all "hot" water piping (100 degrees F - 450 degrees F), Specification §15250-2.4(A) clearly *requires* the contractor to install the more expensive cellular glass insulation on all "chilled" water piping (40 degrees F - 60 degrees F), and Specification §15250-2.4(A)(3) *permits* the contractor to install cellular glass insulation *in lieu of* mineral fiber insulation on all above-ground "hot" water piping. (R4, tab 3) The reverse is simply not true.

Appellant's assertion that permission to install cellular glass insulation in lieu of mineral fiber insulation on all above ground "hot" water piping (100 degrees F - 450 degrees F) also implies permission to install mineral fiber insulation in lieu of cellular glass insulation on all above-ground "chilled" water piping (40 degrees F - 60 degrees F) is illogical and not reasonable in light of the definitive requirement that cellular glass insulation be installed on "chilled" water piping, as clearly found in Specification §15250-2.4(A).

Hyman asserts that Sparta was led to believe that the language of the disputed clause permitted substitution of mineral fiber insulation for cellular glass insulation because of VA's settlement of a claim involving insulation at the Miami VA Hospital. What took

place in connection with the settlement of a claim under the Miami contract is not relevant to interpretation of the Palm Beach contract. The Miami contract, while including a clause identical to §15250-2.4(A)(3) of the Palm Beach contract, also included specification requirements for insulation which differed significantly from the specifications in the Palm Beach contract.

Furthermore, Sparta's president stated in his deposition that Sparta priced it both ways and decided that to get the job it had to go with the mineral fiber price because it was cheaper. Sparta (and Hyman) thus risked an erroneous interpretation of the insulation requirements in order to get the job.

If, as Hyman asserts, the insulation requirements were perceived at bid time as ambiguous, the matter could have been clarified by following the contract instructions found in the "EXPLANATION TO PROSPECTIVE BIDDERS, SPECIFICATION §00100 (FAR 52.214-6)(APR 1984) that explanations or interpretations desir